

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 1651 OF 1996

Shashikant Champaklal Desai ..Appellant
(Ori.Defendant)

versus

Gopaldas H. Parmar ..Respondent
(Ori.Plaintiff)

Mr. N. V. Walavalkar with Vipin Kamdi i/b. M/s.
Zohair & Co. for the Appellant.

Mr. R. N. Bhagattjee for the Respondent No.1.

WITH

FIRST APPEAL NO. 243 OF 1997

Sudhakar N. Sheth ..Appellant
(Ori.Plaintiff)

versus

1. Shashikant C. Desai ..Respondents
2. Gopaldas K. Parmar (Ori.Defendants)

Ms. N. A. Dholakia for the Appellant.

Mr. N.V. Walawalkar with Mr. V. Kamdi i/b. M/s.
Zohair & Co. for Respondent No.1.

Mr. R. N. Bhagattjee for Respondent No.2.

CORAM : D. G. DESHPANDE, J.

DATE : 10TH MARCH, 2005

ORAL JUDGMENT :

1. There are two appeals viz. First Appeal No. 1651 of 1996 and First Appeal No. 243 of 1997 filed against the order passed by the same Judge in different suits i.e. B.C.C.C. Suit No. 7461 of 1977 and Suit No. 1331 of 1980 on different dates, therefore, it will be proper to deal with them separately, but in this Order itself.

2. So far as First Appeal No. 1651 of 1996 is concerned, in this case appellant is the original defendant. Plaintiff filed a suit for declaration that the defendant is a trespasser in respect of the suit premises i.e. Room No.6 in Mani Bhavan situate at Shradhanan Road (Extension) Vile Parle (East), Mumbai 57. According to the plaintiff - Respondent one Venilal was the tenant on monthly rent of Rs.40/-. He was a bachelor. He died on 8.3.1977. At that time he was admitted in the hospital at Santacruz by plaintiff's son Hansraj and one Hotendra was the son of the tenant in the same building. One Shakuntala Saraiya daughter of Venilal's sister also held up Venilal and employer of Venilal supplied him with food and medicines.

Arrangement for funeral of Venilal and expenses were made in that regard by employer of Venilal and after funeral the defendant took possession of the suit premises claiming that Venilal was his uncle. According to the plaintiff therefore the defendant has no right, he was not staying with the deceased at the time of his death, he was a trespasser and therefore he had no right to occupy the suit premises. This suit of the plaintiff was resisted by the defendant on the ground that he was a nephew i.e. brother's son of deceased Venilal, he was living with Venilal during his life time and at the time of death Venilal had virtually adopted him and the defendant was looking after him. After the death of Venilal the defendant requested the plaintiff to transfer the tenancy in respect of the suit premises in his name, the plaintiff demanded sum of Rs.5,000/- which the defendant refused and hence the suit came to be filed.

3. Parties went on trial before the trial court wherein the trial court has framed following issues:

1. Whether the plaintiff has proved that the defendant was trespasser?
2. Whether the defendant has proved that he was tenant ?

The trial court gave finding on issue No.1 in favour of the plaintiff and in the negative against the defendant. So far as issue No. 2 was concerned and secondly decree came to be passed, against which this appeal is filed.

4. I heard counsel for the appellant - defendant and Respondent - Plaintiff at length. Counsel for the appellant strenuously urged that it was amply proved by the defendant that he was residing with the deceased Venilal for quite a long time and he was also there at the time of his death and therefore finding of the trial court on issue No.2 was wrong and contrary to the facts on record. Secondly and alternatively and vehemently it was argued by the counsel for the appellant that even if the defendant - appellant has failed to prove that he was a tenant, he was entitled to the tenancy rights because he was legal heir of deceased Venilal.

5. Mr. Walawalkar for the appellant relied upon two judgments of this court in support of his contention. First judgment relied upon by him was of the Division Bench reported in **1977 Mh.L.J. 792 Rajaram Brindavan Upadhyaya and Ors. vs. Ramraj Raghunath Upadhyaya and Ors.** and the second

judgment reported in 1981 Mh.L.J. 876 C. J. Ghadiali and Ors. vs. Z. B. Wadiwalla.

6. In the first judgment of Division Bench the question that arose was whether provisions of Section 5 (11) (c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred as the "Bombay Rent Act") are not meant to supersede the right of inheritance to the tenancy vesting in the heirs on the death of the tenant under the personal law of the party. The facts of that case are required to be reproduced here. One Brindavan was the tenant of the suit room. He died in 1961. He had three sons Rajaram, Bansraj and Rajkishore and Ramraj was the nephew of Brindavan. The landlord of the room was original defendant No.3 Mansukhlal Tarachand. The sons of Brindavan filed a suit for declaration that they are the tenants of the rooms because they are heirs of the original tenant Brindavan and also sought a declaration that defendant No.1 Ramraj had no right to stay in the suit room because they were alone the heirs of the deceased Brindavan and were entitled to inherit the tenancy rights. Defendant No.1 Ramraj contended that he was in possession of the suit room at the time of death and that the plaintiffs were not in possession and therefore he was required protection as he was a tenant as defined under Section 5(11)(c)

of the Bombay Rent Act. In this suit the trial court found that Defendant No.1 Ramraj was in possession and the plaintiffs were not in possession at the time of death of Brindavan. He therefore gave finding in favour of Ramraj. The trial court also held that the plaintiffs were also entitled to succeed to the right of tenancy on the death of Brindavan and therefore he gave a declaration that plaintiffs were entitled to reside in the suit room alongwith Ramraj - Defendant No.1. Both the plaintiffs and the defendant filed Appeals before the District Court, Thane. The District Court dismissed the Appeal filed by the plaintiffs and allowed the cross objection filed by the defendant no.1. He set aside the decree passed by the trial court and dismissed the suit in its entirety. In that background of the matter, the Division Bench held that provisions of Section 5(11)(c) of the Bombay Rent Act are not meant to supersede the right of inheritance to the tenancy. Division Bench therefore allowed the Second Appeal and set aside the decree of the two Courts below and passed a decree in favour of the plaintiffs and against the defendant declaring that the plaintiffs were the tenants of the suit room and that the defendant no.1 Ramraj should deliver possession to the plaintiffs and that the owner should recognize the plaintiff as his tenant.

7. The second judgment relied upon was in Ghadiali's case, in which this judgment of Division Bench reported in 1977 Mh.L.J. 792 (cited supra) is considered. But this judgment is after amendment of the Bombay Rent Act i.e. Amendment Act No.XXII of 1978 which came into force on 23.10.1978 and Justice Mody who delivered judgment in Ghadiali's case held that : **".... after the above amendment there is a complete change in law and now it is only in the absence of a member of the tenant's family residing with the tenant at the time of his death that any heir of the deceased tenant acquires tenancy rights under the Rent Act."** This case being of different nature will not be of any help to Mr. Walawalkar and only case that will have to be considered, is of Rajaram vs. Ramraj.

8. So far as factual matrix is concerned, it is necessary to see the written statement of the appellant - Defendant and it is pertinent to note that nowhere in the written statement the appellant has claimed that he being the legal heir of deceased Venilal has become entitled to claim tenancy rights under the aforesaid judgment of Rajaram vs. Ramraj. In paragraph 3(b), the defendant has stated that being the nephew of Venilal, this defendant was virtually adopted as his son and he was living with

him. The written statement is lengthy one but nowhere such plea of claiming tenancy rights as legal heirs have been raised. This is reflected also in the issues framed by the court, which are reproduced above and there is no issue that whether the defendant proves that he is a legal heir of Venilal as sole legal heir and entitled to inherit tenancy rights after the death of Venilal. It will be clear from the issues and the pleadings of the defendant that issue of claiming tenancy is raised for the first time in this appeal without there being any pleading of the defendant in that regard in the written statement. There is nowhere any evidence as to how many close relations or relatives of Venilal were alive, no evidence is adduced as to which of those of relatives fall in which category or of the Hindu Succession Act and how to the exclusion of those legal heirs only the defendant should be recognised and accepted as legal heir of the deceased Venilal. In the absence of these pleadings and evidence and issues, I am not inclined to entertain the submissions made by Mr. Walawalkar, which he made alternatively to the effect that even defendant fails to prove that he was residing with deceased Venilal at the time of his death, his case should be considered on the basis of the judgment of Rajaram vs. Ramraj. The said judgment is therefore of no help because in that case who were the legal

heirs of the deceased tenant was on record and they had filed a suit for declaration of claiming tenancy on the basis of legal heirship rights.

9. So far as factual aspect of the matter is concerned, the defendant - appellant has miserably failed to prove that he was residing with Venilal. Trial court has minutely considered the evidence of the defendant - appellant. The defendant came up with a right of being adopted son but he could not produce any other document except ration card in support of his contention and the Trial court has considered this evidence of ration card very very minutely in paragraph 13 of his judgment.

10. I am reproducing paragraph 13, though it is rather lengthy one :

"13. Thus the only evidence of his residence produced by the defendant before the Court is Exh. 7 i.e. the xerox copies of the four pages of the ration card of Venilal. Mr. Balsara the ld. Advocate for the plaintiff submit that Exh. 7 is a fabricated document manufactured only for the purpose of the present suit. Though the defendant states that his name was included in the ration card of deceased Venilal at the time of his death, he has not stated the date on which his name was included in that ration card. There is no dispute that prior to January, 1976 the defendant was residing with his father at Santacruz. Before the defendant's name could be included in the ration card of Venilal, it was necessary to delete the same from the ration card of the defendant's father at the Santacruz premises. The defendant has not stated when his name was deleted from his father's

ration card. The defendant has also not produced before the Court his father's ration card showing such deletion. Perusal of the last page of the ration card (page 2 of Exh. 7) show the name of Venilal Desai as the head of the family and the person to whom the ration card was issued. Thereafter the names of Sudhakar, Vilas, Sanjeev, Manish and Prashant are seen. These are the names of the Sudhakar Seth and his family who undisputedly resided in the suit premises with deceased Venilal till the year 1966. Subsequently these names have been deleted from the ration card. Thereafter appears the name of the defendant. After him the name of one Pankaj C. Desai is shown which was also subsequently deleted. Then comes the name of Bharati Shashikant, the wife of the defendant. Though the defendant has not deposed so, Mr. Bhalekar the ld. Counsel for the defendant submits that the name of the defendant was included in the ration card on 8th February, 1977 i.e. barely a month before the death of Venilal. There are number of additions and deletions in the ration card which appear to have been countersigned by the rationing authorities on different dates. There are as many as 15 signatures and dates noted on this page. the date of 8th February, 1977 seen on this page is not against the name of the defendant in the rations card but is above that name. The entry of the defendant's name is below the date 8th February, 1977 which shows that the defendant's name was entered in the ration card sometime after 8th February, 1977. The date against the name of the defendant is not legible from the xerox copy. That was all the more reason why the defendant ought not to have surrendered the original. Therefore, it is difficult to co-related the date of 8th February, 1977 seen on the ration card to the name of the defendant. The defendant has not explained who is Pankaj Desai and in what circumstances his name was added and subsequently deleted from his ration card, similarly, the defendant has not stated when the names of his wife was included in the ration card. This ration card does not show the names of the two daughters of the defendant. The defendant has disposed that he surrendered the ration card to the rationing authorities in November, 1989. At that time the

defendant's two daughters were aged 9 years and 6 years. It is surprising that their names were not included in the ration card by that time. Thus the claim of the defendant that his name was included by the rationing authorities in the ration card of deceased Venilal as the member of the family during the lifetime of Venilal is not established. Perusal of the first page of the ration card shows that the same was issued to Venilal in the year 1966. Thereafter the name of Venilal was scored off and in its place, the name of the defendant was written. It appears that this was done on 22nd April, 1977 which is the date shown against the deletion of Venilal's name of the last page. The defendant has not stated that he made any application to the rationing authorities for transferring the ration card to his name after the death of Venilal. This page also shows in tabular form the particulars of the member of the units available to the card holder alongwith the signature of the rationing officer. It shows only the entry of "2-0-4". There is a signature appearing against this entry and the date of 10th April, 1983. It is surprising that although at one point of time there were as many as seven names appearing in the ration card, there are no corresponding entries of the number of units at the relevant time. Below the particulars of the number of units a portion of the stamp of the rationing officer is seen. The other portion appears to have been hidden under the piece of paper stuck over this page. Therefore in the xerox copy at Exh. 7 only half of the stamp of rationing officer is seen this is a clear indication of Exh. 7 colly. is a false document fabricated by the defendant for the purpose of this suit, Even if Exh. '7' were to be a genuine document which is a solitary document produced by the defendant can be of no help to him to establish that he was residing in the suit premises as a member of the family of Venilal at the relevant time."

11. From the aforesaid reasons, it is clear that the evidence of ration card is absolutely of no help. It does not prove the case of the appellant -

defendant that he was residing with the deceased Venilal. This document is highly suspicious. No explanation about the loss of original ration card is given and as has been seen by the lower court, it has to be inferred that original ration card was not produced by the defendant because it would not have supported his case at all. There is no reason to come to any different conclusion in this regard. The Trial court has rightly considered the claim and contention of the defendant and therefore judgment of the trial court is not at all required to be interfered with.

12. So far as First Appeal No. 243 of 1997 is concerned, the appellant in that Appeal is the original plaintiff. He had filed a suit for declaration against Shashikant Champaklal Desai and GopalDas Khusaldas Parmar. According to him Shashikant was a trespasser in respect of same room No. 6 of Mani Bhavan and he has shown defendant no.2 GopalDas as owner of the premises. He has claimed permanent injunction against the defendant from creating third party interest in the suit premises. His case was that he was a joint tenant with Venilal Desai - the deceased tenant pursuant to Agreement for Construction Loan executed in 1957. Further he made equal contribution for raising the loan and it was agreed that rent bill was to be in

the name of deceased Venilal and both were to share kitchen and all household expenses equally including the rent. According to him this arrangement continued till 1966 when the plaintiff left the suit premises and stayed elsewhere but he came back in 1975 with his family. Again at the request of Venilal he left the premises. He therefore contended that no member of Venilal's family was residing with him at the time of Venilal's death and after the death of Venilal the plaintiff requested defendant No.2 the owner to hand over possession. Defendant no.2 told him that defendant No.1 had taken possession. He therefore wrote a letter and then filed a suit. Obviously defendant No.2 denied all the claim and contention of the plaintiff. Issues were framed by the trial court as below:

1. Whether the plaintiff proves that he is a tenant of the suit premises along with one deceased Venilal C. Desai?
2. Whether the plaintiff proves that defendant No.1 is a trespasser with respect to the suit premises?
3. Whether Defendant No.1 proves that he is a tenant with respect to the suit premises?

4. Whether the plaintiff is entitled to a decree against defendant No.1 to remove himself and his belongings and hand over possession of the same to the Plaintiff?

In order to prove his case, the plaintiff produced Exhibit 'A' Construction Loan Agreement dated 12.8.1958. It was produced from the custody of the defendant No.1. The Court found that the agreement was between Venilal and defendant no.2 and there was no reference whatsoever to the plaintiff. The Plaintiff had no documentary evidence of whatever nature that he has made any contribution in this loan or the loan was given to him jointly with Venilal. There is no endorsement of the plaintiff on this document and the Court held that the case of the plaintiff was completely falsified by this documents itself. The trial court did not find any iota of truth in the case of the plaintiff.

13. Counsel for the Appellant - Plaintiff contended that the judgment and reasoning of the trial court is wrong, but I do not find any substance in that contention. The claim of the plaintiff is basically suspicious because he has nothing to show his connection with the suit room. He has no supporting evidence and no documentary

evidence to show that he ever resided or stayed in the suit room and in what capacity. He is not related to Venilal in any manner and atleast there are no pleadings to that effect in the plaint. Therefore the case of the appellant was rightly dismissed. No interference is called for.

14. In the circumstances therefore I find that the claim and contentions raised by both the defendants were without any basis, they had no iota of evidence in possession to prove their contentions. They were rank trespassers and asserting rights without any statutory or legal right and therefore in the circumstances the plaintiff is also entitled for compensatory costs.

14. In the result, I pass the following order:

ORDER

. Both the Appeals are dismissed with costs throughout and compensatory costs of Rs.5,000/- each. Premises to be vacated within six weeks from today.